Supreme Court, U.S.
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No. 95

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JOE O. RAGAN,

Petitioner,

CONTICOMMODITY SERVICES, INC. and
CONTINENTAL GRAIN COMPANY,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in calculating damages for a forced or defrauded seller of securities or commodities by determining a reasonable time for reinvestment, consideration must be given to any wrongful interference by the defendant with the ability to reinvest as well as the nature of the investment and trading at issue.

2. Whether a forced or defrauded seller of securities or commodities must take any particular steps in order to preserve a claim for damages.

LIST OF PARTIES AND RULE 29.1 STATEMENT

There are no parties to this proceeding not revealed in the caption of this case.

Respondent ContiCommodity Services, Inc. is a wholly-owned subsidiary of Respondent Continental Grain Company, whose shares are not publicly traded.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Joe O. Ragan respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 12, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 63 F.3d 438 (5th Cir. 1995) and is reprinted in the Appendix at App. 1A-16A.

JURISDICTION

On September 12, 1995, the United States Court of Appeals for the Fifth Circuit entered its order affirming the decision of the district court. (App. 1A) Petitioner timely filed a Petition for Rehearing on September 26, 1995. The Petition for Rehearing was denied on October 11, 1995. (App. 17A-18A). The mandate issued on October 19, 1995.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

From in or about August 1981 until May 24, 1984, Petitioner Joe O. Ragan ("Ragan") traded government securities and futures contracts through a customer account at ContiArbitrage-Houston ("CAH"). CAH was one of the then-numerous branch offices of ContiCommodity Services, Inc. ("Conti"). Conti was, and is, a wholly owned subsidiary of the Continental Grain Company ("Continental"). (App.3A).[1]

On May 24, 1984, Continental ordered Conti to close out all of the government securities positions in the CAH customers' accounts, including Ragan's, within 24 hours. (App.4A-5A). Continental ordered the shutdown for its own business reasons unrelated to any CAH customer profits or losses. The shutdown came without warning to any of the CAH customers. (R.7:4569-72; Dkt.#1483, ¶65; Dkt.#1420 ¶64; D. Ragan Dep. at 2886-87).[2]

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[1] References to the Appendix herein are cited as "App.__."

[2] Certain of the pleadings filed in the Northern District of Illinois were not included in the record compiled by the Clerk of the Southern District of Texas. On motion of the parties, those pleadings were added as supplements to the record and are referred to by their docket numbers on the Northern District of Illinois's docket sheet.

The docket sheet is Item number 2 in Ragan's Record Excerpts provided to the Fifth Circuit and is hereinafter cited as "Rec. Ex." References to the Record on Appeal are cited as "R.___."

A. The General Nature Of Government Securities And How They Differ From Stocks And Commodity Futures Contracts.

Unlike common stocks and commodity futures contracts, government securities have specified maturity dates and interest payments that are fixed when the securities are issued. Consequently, government securities naturally increase in value as the maturity date approaches in what is called the "pull to par"; "par" being the face value of the securities. This characteristic of government securities provides a locked-in final value. (R.6:4714-22; 4827; Dkt No.1483, ¶¶58. 298-99, 323; Dkt.#1420, ¶15).

Government securities are frequently traded (as they almost always were at CAH) using repurchase agreements ("repos"). When a seller repos a government security to a buyer, the seller agrees to repurchase similar securities from the buyer for a specified price on a specified date. Because the repurchase price includes an interest charge covering the period of the agreement, the seller is effectively lending the buyer the purchase price of the security and charging him interest on that loan. (Id.; Dkt.#1420, ¶¶27-29).

B. The Nature Of Ragan's Government Securities Trading.

Ragan's CAH account generally employed a particular type of arbitrage trading using government securities to profit from, *inter alia*, the difference, i.e.,"the spread" between the repo interest paid on the securities on the one hand and the coupon and other interest received from the securities as well as the changes in their market values due, at least in large part, to the pull to par.

(R.6:4714-22; Dkt No.1483, ¶¶58, 298-99, 323).

Because these trades depended on small differences in repo interest paid and coupon interest received plus the changes in market value, these trades necessarily took place over extended periods of time. As a reflection of this underlying trading strategy, Ragan's account frequently held positions for up to a year and sometimes longer throughout the two and a half years that the account was open. (Id.; R.6:4825-28, 4722; D. Ragan Dep. at 2874-84).

C. Conti's Loan Program.

Interest rates and government securities market values change over time. These value changes can, and did, result in temporary negative balances in the CAH customer accounts. Because of the size of the CAH government securities trades, these negative balances could, and did, sometimes range into the thousands, and occasionally, millions of dollars. (Dkt.#1483, ¶301).

These account value fluctuations had been anticipated even before CAH opened. To deal with them, from the outset of the CAH trading, Conti routinely lent the CAH customers funds to cover any negative balances on the government securities sides of their accounts. (App. at 3A-4A; R.6:4767-70). Conti charged the customers interest on those loans as a necessary part of the overall CAH trading operation. (R.4:5267-69; R.6:4725, 4787, 4750-55; R.7:4520-21). Because the nature of the trades effectively assured Conti of repayment of its loans, and because Conti was lending the CAH customers the funds to cover both their trading and any negative balances in their accounts (rather than demanding additional funds as margin), neither

Conti nor the customers had a significant risk of loss if these trades were allowed to run to completion. (R.6:4714-22).

As a result of its loan program, during the life of CAH, Conti virtually never sent out margin calls for negative balances in the government securities portions of the CAH customer accounts. Instead, the negative balances (and any Conti-loans to cover those negative balances) were consistently repaid from the highly profitable interest rate spreads and increased market values in the customers' long term trades. Conti issued margin calls only for negative balances on the futures sides of the accounts. (R.6:4699).

D. Ragan's Objections To The Shutdown And Efforts To Salvage His Account.

Continental's and Conti's May 24, 1984 instructions to close out the CAH customers' government securities positions came to Ragan's son, David J. Ragan ("David"). At that time, David was head trader and CAH branch manager. (R.5:5098; R.6:4831, 4624; Dkt.#1483, ¶¶25, 63, 314).

David objected to the shutdown order, *inter alia*, reminding Conti management once again that the immediate closeout of the customers' positions at that time would cause the irretrievable realization of the theretofore unrealized losses in the accounts.[3] (See, e.g., D. Ragan

[3] At that time, Conti had made approximately $55 million in payments to various government securities dealers for the CAH customers. This amount was not unusual. Nine months earlier, in August 1983, Conti had approximately $33 million

Dep. at 3087). He told Conti management that if the positions were left alone a little longer, everyone would make money. In response, David was told that, if he did not close out the customer positions immediately, other Conti personnel would do it for him. (R.6:4624; D. Ragan Dep. at 2871-73).

As instructed, David closed out virtually all of the CAH customer government securities positions that same day and resigned from Conti the following day, May 25, 1984. (R.7:4546-49; Dkt.#1483 ¶¶35, 284-85).

David immediately went to work for Merrill, Lynch. Ragan wired instructions to Conti to transfer his account and all of his positions to Merrill, Lynch. Conti refused. David then tried to arrange through Conti executives to have the transfer of Ragan's account made. Again Conti refused. (R.1:5994-99; 6067-72; R.4:570-72).

Conti stated that it would transfer whatever losing negative futures positions remained in Ragan's account, but would retain all of the cash and the positive futures positions. Conti also stated that it would not reinstate any of the government securities positions that had been closed

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in outstanding payments to the dealers. Over the next five months, David and his traders realized approximately $15 million in profits, thereby reducing the outstanding dealer balances to approximately $18 million by the end of January, 1984. In February 1984, the market declined somewhat and the dealer payments increased again to $33 million. Prices flattened in April before dipping steeply in May 1984. (R.6:4692-95). The market turned upward again within days of the shutdown and began a 2-year climb.

out. (R.1:5994-99; 6067-72; R.4:570-72).

As a futures commission merchant itself, Conti knew that neither Merrill, Lynch nor any other brokerage house would accept the losing positions from Ragan's CAH account without the offsetting positive futures positions and cash collateral that Conti had stated it would not relinquish. (Dkt.#1421, ¶¶889-92) From Ragan's account papers, Conti also knew that Ragan did not have the financial resources to reinstate his closed, government securities positions himself, and that, absent a loan program like Conti's, no other brokerage house would reinstate those positions for him. As a result, Ragan was never able to reopen any of his government securities positions. Within two weeks of the shutdown, Conti sold Ragan's futures positions, retaining approximately $300,000 of his money in the process. (R.1:5846-5972; 5977-6080; R.2:5545-5845).

Approximately five days after Continental had ordered CAH shutdown, the government securities market bottomed out and began, what eventually became, a two-year bull market. If Conti and Continental had not closed out Ragan's government securities positions on May 24, 1984 and Ragan had done nothing but sit on the positions that should have been in his account, then, based on publicly reported government securities prices and repo rates, by October 1984 -- four months after the shutdown -- the entire deficit in Ragan's account would have been eliminated due to a combination of the "pull to par", better interest rate spreads and the generally improved market conditions. Based on the same publicly reported prices and repo rates, from October 1984 at least through December 1985, those same positions would have resulted in ever-

increasing profits in Ragan's account. (Id.).[4]

II. PROCEDURAL BACKGROUND

Following the shutdown, Conti and Continental sued Ragan. Ragan counterclaimed alleging, *inter alia*, breaches of contract and fiduciary duty, fraud and conversion. These cases were consolidated with others filed in the wake of the CAH shutdown as Multi-District Litigation No. 644 ("MDL 644"). (App.1A, 3A, 5A).

The district courts that handled this case had jurisdiction under both 28 U.S.C. §1332 (due to the complete diversity of the parties) and under §1331 (for certain of Joe Ragan's claims). Ragan is, and was, a resident of the State of Missouri while Continental and Conti are both corporations organized under the laws of the State of Delaware. Continental has, and had its principal place of business in New York, New York. Conti has, and had its principal place of business in Chicago, Illinois. The amounts in controversy substantially exceeded $50,000.

Following discovery, in 1989, 1993 and again in 1994, Conti and Continental filed three separate summary judgment motions on Ragan's claims. (App. at 5A, 14A-

[4] As explained above, Continental's decisions to shutdown CAH and to close the customer accounts was unrelated to Conti's loan program or to the customer losses. The shutdown would have happened even if the accounts had all been "positive" on May 24, 1984, because Continental had been given a date by its auditors of June 1, 1984 to be out of the government securities business altogether. (R.7:4569-72; Dkt.#1483, ¶65; Dkt.#1420, ¶64).

16A; R.2:5545-5845; R.3:5308-29, 5333-5438; R.4:5123-5264A, 5267-5302). None of the motions ever denied that Conti and Continental had wrongfully shut down CAH and seized Ragan's account. Rather, all three motions argued only that Ragan had no damages from the wrongful seizure of the accounts. (Id.).

Conti's and Continental's second and third motions were essentially identical in that both claimed that Ragan had no damages because on May 24, 1984 his account had a negative balance ("debit") position based on that day's market prices.[5] Ragan responded to both motions by pointing out that the debit balance was irrelevant: i) because Conti was financing the trading; and ii) because of the long-term, locked in profitability of the trades due to the pull to par and the interest rate spreads -- a profitability that Ragan had been denied because of Conti's and Continental's improper shutdown of CAH. (Id.).

The district courts denied Conti's and Continental's first and second motions (App.5A, 14A-16A; R.3:5439), but on April 14, 1994, the district court granted their third summary judgment motion. (App.5A, 14A-16A; R.2:5972-76). The district court dismissed with prejudice all of

[5] The first summary judgment motion claimed that he had no damages because he had withdrawn more money from his trading account than he had deposited. The underlying premise was that CAH customers were not entitled to trading profits when those profits exceeded the amount of the customer's initial and later margin deposits.

Ragan's claims against Conti and Continental.[6] At Conti's and Continental's request, in its April 14, 1994 Order and pursuant to F.R.Civ.P. 54(b), the district court also expressly found that there was no just reason to delay entry of a final judgment dismissing appellants' claims or to delay appeal of that judgment. Final judgment was, therefore, entered on Ragan's claims on April 14, 1995 thereby making that judgment final and appealable. (App. 5A-6A).

Ragan's Notice of Appeal was timely-filed on May 6, 1994. After briefing and oral argument, on September 12, 1995, the United States Court of Appeals for the Fifth Circuit issued its Opinion in this case affirming the district court's grant of summary judgment. (App. 1A-16A). A timely-filed Petition for Rehearing was denied by the Fifth Circuit on October 11, 1995. (App.17A-18A). This Petition seeks review of the Fifth Circuit's September 12, 1995 Opinion.

REASONS FOR GRANTING THE PETITION

The proper measure of damages for a forced or

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[6] Conti and Continental's claims against Ragan, however, remain pending in the district court. On appeal, Conti and Continental promised the Fifth Circuit that they would dismiss their claims if the Fifth Circuit affirmed summary judgment. To date, however, their claims remain pending -- but stayed -- in the district court. Conti and Continental have told the district court that they want their claims to continue stayed because they need the pendency of those claims as "leverage" against David Ragan in ongoing litigation pending in the Illinois state courts.

defrauded seller of securities or commodities -- and what, if any, steps the seller must take to preserve any claims for those damages -- raise important issues of federal law which this Court has not specifically addressed since its decision in Galigher v. Jones, 129 U.S. 193 (1889) more than a century ago. Since that decision, the district and circuit courts have developed a presumption that any failure of a trader to reinvest or request reinstatement of his securities or commodities within a period of days, or at most weeks, must be viewed as a voluntary decision by the seller to leave the market. E.g., (App.15A-16A). This Court has not addressed either that presumption, or what effect, if any, the defendant's interference with the trader's efforts to reinvest should have on the measure of damages. The Court has also not addressed the issue of what impact the nature of the securities and the manner of their trading should have on the calculation of damages and the period of time for which those damages should be calculated.

This issue of a seller's damages frequently recurs as evidenced by the significant number of reported cases on the subject. See e.g., Katara v. D.E. Jones Commodities, Inc., 835 F.2d 966, 972-73 (2nd Cir. 1987)(cases collected therein). These issues, therefore, have significance beyond this case. The tension between the facts of this case, the prior case law and the Fifth Circuit's extreme reading of both, provide a uniquely appropriate context for this Court to address and define this body of law that has developed since the Court last spoke on the subject more than a hundred years ago.

The reason is that the facts of this case place Petitioner's damage calculations at the end of the spectrum requiring an extended period of time in which damages

should be measured. The Fifth Circuit's decision falls on the opposite end of the spectrum. It takes a restricted view of Petitioner's damages, apparently looking for a rule of law expressly setting forth the applicable time limit within which to measure Petitioner's damages. Finding no such rule, the Fifth Circuit affirmed the district court's determination that Ragan had no damages within a "reasonable" period of time, and did so while imposing substantial restrictions on what a defrauded or forced seller like Ragan must do to preserve his rights to damages. (App.14A-16A).

If the Fifth Circuit's reasoning is adopted in other forums without clarification by this Court, it will substantially restrict investors' rights to damages in contravention of this Court's express language in Galigher. Hence, this case presents the Court with both the opportunity and the necessity to address and clarify both the broad range of factors that must be considered, and to set the standard for damage determinations in cases of forced or defrauded securities and commodities sellers.

A. Galigher Allows For An Extended "Reasonable Period" Of Time In Which To Measure A Seller's Damages.

In Galigher v. Jones, 129 U.S. 193 (1889), this Court confronted the issue of the proper measure of damages where an investor's common stocks had been sold by his broker without authorization. In reaching its decision in Galigher, this Court expressly rejected the notion that the plaintiff's damages should be measured by the value of the securities at the time of their conversion (the determinative

date for damages erroneously used by both the district court and the Fifth Circuit). Instead, the Galigher Court wrote:

> To allow merely their value at the time of conversion would, in most cases, afford a very inadequate remedy, and, in the case of a broker, holding the stocks of his principal, it would afford no remedy at all. The effect would be to give to the broker the control of the stock, subject only to nominal damages. The real injury sustained by the principal consists not merely in the assumption of control over the stock, but in the sale of it at an unfavorable time and for an unfavorable price.

129 U.S. at 200.

The Galigher Court, therefore adopted the reasoning of a line of New York state cases holding that a forced or defrauded seller is entitled to have his damages measured by the "highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock." Id. at 200-02.

The rationale behind this measure of damages is to allow the injured party to place himself in the position in which he would have been if his rights had not been violated. Id. at 200. It allows the defrauded seller the benefit of receiving the highest price at which the defrauded seller voluntarily may have sold the securities within a reasonable amount of time after liquidation. It also reflects, however, the defrauded seller's obligation to mitigate

damages. Letson v. Dean, Witter, Reynolds, Inc., 532 F.Supp. 500, 503 (N.D.Cal. 1982); aff'd. sub nom., Shearson, Loeb, Rhoades, Inc. v. Bryant, 730 F.2d 769 (9th Cir. 1984)(Mem.)

What constitutes a reasonable time period must be determined on a case by case basis depending on the facts of the individual case. Katara v. D.E. Jones Commodities, Inc., 835 F.2d 966, 972-73 (2nd Cir. 1987). The Galigher Court concluded on the facts that approximately 60 days was a reasonable time for reinvestment in that case.

The Fifth Circuit has rejected the Galigher rule by restricting Ragan's damages to their "market value at or near the time they were sold by Conti." (App. at 14A-15A). This restriction -- as the Galigher court held a century ago -- provides no remedy at all because it does not allow the defrauded seller to place himself in the position in which he would have been had his rights not been violated.

It also ignores both the nature of the securities at issue here as well as the nature of their trading. The securities have a naturally, occurring maturity value. Profiting from those securities required holding them for extended periods of time so that the interplay of market values and interest rate spread created a profitable result.

The Fifth Circuit acknowledged at the outset of its decision that one may properly value these securities using their maturity values less the cost of financing them to their maturity as Ragan did both during the life of CAH and for purposes of summary judgment. (App.4A, n.3, 14A-16A).

The Fifth Circuit, nevertheless, contradictorily denies damages to Ragan on precisely that basis, rejecting the Galigher rule in the process. Such a determination, if adopted by other courts, could have a deleterious effect on other investors in government securities such as banks, pension funds and other large institutions who do the bulk of government securities trading. Consequently, the Fifth Circuit's rejection of Galigher should be reversed now by this Court.

B. A Defrauded Seller's Non-Reentry Into The Market Does Not Preclude Damages; It Merely Sets An Outside Limit On The Defrauded Seller's "Reasonable Time" For The Computation Of Damages.

Although this Court affirmed an award of damages in Galigher, there is no indication that the investor there ever reinvested or even attempted to reinvest in the wrongfully sold securities.[7] Therefore, it has subsequently

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[7] The Galigher opinion did hold that a failure to object to an unauthorized trade at the time it occurs effectively ratifies the transaction. As part of its holding in this case, the Fifth Circuit stated that there was no indication in the record that, *inter alia*, Ragan had objected to the closeouts of his positions. That is incorrect. David Ragan expressly objected to Continental's and Conti's direction to close out the CAH customer positions. See, e.g., David Ragan Dep. at 2871-73, 3087. Additionally, as was expressly explained to the Fifth Circuit and is repeated above, Ragan was given no choice about closing out the CAH customer positions; he was told that if he did not do it, then other Conti personnel would.

Although David Ragan's deposition was part of the

been consistently held, consist with Galigher, that the defrauded seller's ultimate non-reentry into the market does not mean that the defrauded seller cannot recover any damages. Rather, the non-reentry simply limits to a "reasonable time" the period during which the defrauded seller may remain out of the market at the broker's expense. Letson at 503. The "reasonable time" is simply that period during which the defrauded seller is out of the market and presumably deciding whether or not to reenter it. Id. If the defrauded seller does not repurchase the lost positions within a reasonable period of time, then that inaction will be presumed to be a decision to stay out of the market. Id.; See also, e.g., Chipser v. Kohlmeyer & Co., 600 F.2d 1061, 1067-68 (5th Cir. 1979).

The Fifth Circuit's decision rejects this rule. The Fifth Circuit holds that the non-reentry into the market effectively eliminates damages by restricting them to the value of the securities at or near the time of their unauthorized sale, rather than using the non-reentry into the market as merely a trigger to set a future limit on the reasonable time period afforded for reinvestment. The Fifth Circuit's ruling creates precisely the problem that the

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record before the Fifth Circuit, the issue of Ragan's objection to the close out of his positions was never raised in Conti's and Continental's three summary judgment motions; it was never referenced in the district court's order granting summary judgment and therefore, it was never raised on appeal (even during oral argument) by any of the parties. Consequently, the Fifth Circuit's attention was never directed to David Ragan's deposition testimony because, as far as the parties were aware, that was not an issue on appeal. Rather, the Fifth Circuit only referred to it for the first time, *sua sponte*, in its September 12, 1995 opinion in this case.

Galigher Court long ago tried to eliminate by rejecting the use of market values at the time of the unauthorized sale in determining damages. The Fifth Circuit, therefore, should be reversed.

C. In Determining Damages, Particularly Where The Defendant's Wrongful Actions Have Interfered With The Ability To Reinvest, The Defrauded Seller's Damages During The "Reasonable Time" Period Must Be Linked To The Defrauded Seller's Ability To Reinvest.

The post-Galigher cases all presume that a defrauded seller's non-reentry into the market is the result of a voluntary decision. See, e.g., Letson at 504 (discussing reasons for permitting reasonable time period, including fact that defrauded seller must be allowed time to consult with advisers and have time to raise funds to reinvest while making a decision to re-invest in market).

As discussed above, however, the determination of what constitutes a "reasonable time" period for reinvestment is made on the individual facts of each case. Katara v. D.E. Jones Commodities, Inc., 835 F.2d 966, 972-73 (2nd Cir. 1987). Where, as here, the defendant has made it impossible for the defrauded seller to reenter the market, then the "reasonable time" period "should be linked to [the defrauded seller's] ability to reinvest." Modern Settings, Inc. v. Prudential-Bache, 747 F.Supp. 194, 196-97 (S.D.N.Y. 1990), rev'd on other grounds, 936 F.2d 640 (2nd Cir. 1991).

As discussed above, a defrauded or forced seller's

non-reinvestment simply triggers the procedural obligation of the court and/or fact finder to determine a "reasonable time" period within which the defrauded seller should have reinvested. Therefore, in deciding what would be a "reasonable time" for reinvestment, the seller's ability to reinvest -- particularly where, as here, the defendant has made reinvestment difficult or impossible -- should be a crucial factor to be weighed in determining the length of that "reasonable time" period.

The Fifth Circuit's decision rejects this rule also. It holds that any non-reinvestment is, as a matter of law, a voluntary decision "to avoid further loss", effectively waiving any right to damages except those incurred at, or near, the time of the wrongful act, rather than those that were incurred over a "reasonable time" as Galigher mandates. In the process, the Fifth Circuit also rejects the rule (followed in every other reported decision) that, in determining the "reasonable time", consideration should be given to the facts of the individual case. These necessarily include the nature of the securities and/or commodities at issue, the markets involved, the defrauded seller's ability to reinvest and the extent to which the defendant's wrongful actions may have interfered with the plaintiff's ability to reinvest.

In this case, the Fifth Circuit also ignores the fact that Ragan had little or no risk of loss that he would choose to avoid by not re-investing. Conti, not Ragan, was financing the trading through its loans. The near-certainty of profits over the long-term holding periods that Ragan employed with his securities also assured that there was little risk of loss. Consequently, in this case, the evidence clearly showed that there was no "voluntary" decision not

to reinvest. Rather, Ragan was involuntarily precluded from reinvesting by Conti's and Continental's wrongful actions. That should also be a factor to be weighed in the determination as to what is a "reasonable time" for reinvestment; a consideration that the Fifth Circuit erroneously declined to give.

Because the Fifth Circuit's ruling conflicts with the other Circuits and with this Court's own ruling in Galigher, it should be reversed by this Court.

CONCLUSION

For the foregoing reasons, Petitioner Joe O. Ragan respectfully requests that the Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

CONTICOMMODITY SERVICES, INC. and Continental Grain Company, Plaintiffs-Counter-Defendants-Appellees,

V.

David J. RAGAN, et al., Defendants,

David J. Ragan and Joe O. Ragan,
Defendants-Counter-Plaintiffs
- Appellants. -

No. 94-20362.

United States Court of Appeals,
Fifth Circuit.

Sept. 12, 1995

As part of multidistrict litigation, employer, a commodity trading firm, brought action against former employee and customer for damages arising from trading activity attendant to closing of employer's branch office. Employee filed counterclaim alleging breach of contract, defamation, and tortious interference with business relationship. Customer filed counterclaim alleging breach of contract. The United States District Court for the Northern District of Illinois, William T. Hart, J., 733 F.Supp. 1555, granted in part employer's motion for summary judgment and transferred the remaining claims to Texas. The United States District Court for the Southern District of Texas, Norman J. Black, Chief Judge, granted employer's motion for summary judgment on the remaining claims and employee and customer appealed. The Court of Appeals, Stewart, Circuit Judge, held that: (1) employee's criminal conviction did not

satisfy truth inquiry as to his claims against employer for defamation or tortious interference by way of defamatory statements; (2) employee failed to establish "actual malice" necessary to overcome employer's qualified immunity defense to defamation claim; (3) employee failed to establish "malicious and intentional action" necessary for his tortious interference with business relationship claim; and (4) customer's claim, arising out of firm's orders to close out trading "positions" in his account, was one for conversion, rather than for loss of value, at maturity, of securities and commodities in his account.

Affirmed.

Bruce Rose, Rose, Magnuson & James, Westchester, IL, for appellants.

David T. Pritikin, Constantine L. Trela, Jo Lynn Haley, Sidley & Austin, Chicago, IL, Lawrence G. Weppler, Continental Grain, New York City, William G. Rosch, III, Rosch & Ross, Houston, TX, for ContiCommodity.

Appeal from the United States- District Court for the Southern District of Texas.

Before POLITZ, EMILI0 M. GARZA and STEWART, Circuit Judges.

STEWART, Circuit Judge:

As part of multidistrict litigation, ContiCommodity Services, Inc. and Continental Grain Company (together referred to herein as "Conti")[1] filed suit against David J. Ragan and Joe O. Ragan for damages arising from financial market trading activity attendant to the closing of Conti's Houston branch office. *ContiCommodity Services, Inc. v. Ragan*, No. H-84-4652 (S.D.Tex.); *In re ContiCommodity Services, Inc., Securities Litigation*, 733 F.Supp. 1555 (N.D.Ill. 1990). The Ragans filed a counterclaim against Conti, asserting *inter alia* that these damages arose because Conti had breached its contract to finance their debit balances and had made defamatory statements about David Ragan. The district court granted in part Conti's motion for summary judgment against the Ragans, and the Ragans appeal. We affirm.

FACTS

In 1981, Conti hired David Ragan to work in its Houston, Texas branch office. He conducted arbitrage trading, ranging from less speculative hedged positions to more speculative cash trading, for his customers and for his own account.[2] Conti routinely loaned money to

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[1] ContiCommodity Services, Inc., was a fully owned subsidiary of Continental Grain Company.

[2] "Arbitrage trading is the simultaneous purchase and sale of the same or equivalent securities or commodities in different markets or on different exchanges at different prices, in order to profit from the price differences between markets." *In re ContiCommodity Services, Inc.*,

Ragan's customers to finance trading activity, so that the customers had to deposit only a percentage of the transaction amount. The value of the customer's securities or commodities "position" could be expressed simultaneously in several ways which include (1) the net[3] face value of the position; (2) as the net market value of the position; (3) as the net face or market value of the position, minus the amount financed and associated fees or interest cost. By early 1984, the Houston branch office had sustained losses and Conti decided to close it.[4]

Securities Litigation, 733 F.Supp, at 1562.

[3] The securities or commodities could be (1) purchased in anticipation of an increase in market value and later sold; (2) sold -- or borrowed from elsewhere and sold (i.e., "sold short") -- in anticipation of a decrease in market value and later purchased for return to the presale owner of the security. These various options could be done at the same time in different markets, or at different times but with the same security or commodity, as noted above in footnote 2. "Net" value, as used in this sentence, refers to the net value of the purchases and the short sales. In addition, the cash securities could be purchased and held until maturity, at which time the face value and interest due on the security could be used to repay any amount that was financed.

[4] By the time it closed on May 24, 1984, Conti's Houston branch office had incurred more than $55 million in trading losses for the accounts of its arbitrage and speculative customers. The closing of the Houston office spawned numerous

The instant facts arise from Conti's decision to close out the customers' accounts in conjunction with the closing of its Houston office.

Conti filed suit against David Ragan, alleging fraudulent and fictitious transactions. The Ragans filed a counterclaim against Conti. In this counterclaim, David Ragan alleged that Conti breached its contract with him, tortiously interfered with David Ragan's employment contract, reputation, and prospective customer relationships by making defamatory statements, and fraudulently concealed its decision to close the Houston office. Joe Ragan alleged that Conti breached its contractual and fiduciary obligations by closing out his positions and thereby keeping him from reducing or offsetting his losses.

Many of the claims of the numerous parties to this case and related cases in this multidistrict litigation were disposed of in Illinois before United States District Judge Hart and are documented in a written opinion. *See In re ContiCommodity Services, Inc., Securities Litigation.* Among Judge Hart's rulings were summary judgments entered on several of the Ragans' claims against Conti. Judge Hart transferred the remaining claims between Conti and the Ragans to the United States District Court for the Southern District of Texas where United States District Judge Black rendered a final summary judgment against the Ragans on their remaining claims. The Ragans appeal this final summary judgment, as well as

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lawsuits in which approximately two million documents were filed.

some of the judgments entered by Judge Hart. The parties agree that Texas law is applicable to these state law claims.

DISCUSSION

The Ragans argue that the Texas district court erred in entering summary judgment because the evidence was sufficient to defeat the motion for summary judgment and because it reached issues that either were not appealed or had been decided by Judge Hart.

We review the district court's grant of summary judgment *de novo*. *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991), cert. denied, 502 U.S. 1059, 112 S.Ct. 936, 117 L.Ed.2d 107 (1992). Summary judgment is appropriate when the moving party shows that there is no genuine issue of material fact. *Id.* The moving party may make this showing by pointing out the lack of evidence to support the nonmoving party's case. *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995); *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 913 (5th Cir. 1992), cert. denied, -- U.S. -- , 113 S.Ct. 98, 121 L.Ed.2d 59 (1992). Once this showing is made, summary judgment is proper against the nonmoving party when the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 321, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Duffy*, 44 F.3d at 313-14. In order to defeat a properly supported motion for summary judgment, the nonmoving party must direct the

court's attention to admissible evidence in the record which demonstrates that it can satisfy a "fairminded jury" that it is entitled to a verdict in its favor. *International Shortstop, Inc.*, 939 F.2d at 1263; *Howell*, 897 F.2d at 192. At this point, the mere allegations in the complaint are not sufficient; the non-movant is required to identify specific evidence in the record, and to articulate the "precise manner" in which that evidence supported their claim. *Id.*; *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994), cert. denied, -- U.S.-- , 115 S.Ct. 195, 130 L.Ed.2d 127 (1994).

We shall address the summary judgment entered as to David Ragan and Joe Ragan, respectively.

A. Summary Judgment Against David Ragan[5]

Criminal charges were instituted against David Ragan for fraudulent and fictitious trade transactions in the form of eighteen counts of mail and wire fraud. A jury found him guilty on all eighteen counts. On July 16, 1993, while Ragan's conviction was on appeal to this court, Judge Black granted summary judgment in favor of Conti and against David Ragan because "David Ragan's criminal conviction eliminates any genuine issue of material fact regarding the issue of truth .... "[6]

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[5] References in this subsection to "Ragan" refer to David Ragan.

[6] Judge Black's "Final Judgment", filed April 14, 1994, referred to this July 16, 1993 order as

Before transfer of this case to Texas, Judge Hart had dismissed Ragan's tortious interference with employment claims "to the extent claims are made based on any employment relationship other than the one with Merrill Lynch", and had dismissed Ragan's claims of tortious interference with customer and business relations because Ragan presented "no nonhearsay testimony showing that counterdefendants provided any false information to the customers." *In re ContiCommodity Services, Inc., Securities Litigation*, 733 F.Supp. at 1581. Judge Hart's reasoning was as follows:

> There is evidence from which it can be inferred that counterdefendants intended to induce David Ragan's firing. David Ragan has also presented evidence to support the claim that the information provided by counterdefendants caused David Ragan's dismissal from Merrill Lynch. David Ragan, however, has not presented specific facts showing counterdefendants caused the loss of any other employment.

In the "Final Judgment" at bar, Judge Black granted summary judgment against Ragan on all remaining claims. The basis expressed for this judgment was that (1) Ragan's criminal conviction settled the question of the truth of Conti's allegedly tortious and defamatory statements in Conti's favor; (2) therefore, there is no

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the basis for final judgment against David Ragan. Ragan challenges as error the use of his conviction as the basis for summary judgment against him.

longer a genuine issue of material fact about the truth of these statements; and (3) therefore summary judgment is proper. There being no statutory or jurisprudential basis for the proposition that a criminal conviction satisfies the truth inquiry in a civil proceeding for defamation or tortious interference by way of these statements, neither party argues on appeal that Judge Black entered summary judgment against David Ragan for the correct reasons.[7]

The district court's grant of summary judgment against David Ragan, on the basis of his conviction which was on appeal at the time of judgment, was improper. Nevertheless, summary judgment may be affirmed on grounds other than the basis of the district court's decision. *See Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 193 (5th Cir. 1990); *see also, Matter of Lewisville Properties, Inc.*, 849 F.2d 946, 950 (5th Cir. 1988) and cases cited therein. We shall therefore address *de novo* whether the judgment was proper despite its improper basis.

Accusations or comments about an employee by his employer, made to a person having an interest or duty in the matter to which the communication relates, have a qualified privilege. *Schauer v. Memorial Care Systems*, 856 S.W.2d 437, 449 (Tex. App. Houston [1st Dist.] 1993) (citations omitted). This privilege protects such

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[7] The conviction was reversed on appeal to this court because the record did not show a sufficient connection between David Ragan and the charged offenses. *United States v. Ragan*, 24 F.3d 657, 660 (5th Cir 1994).

communications in the absence of actual malice.

In the defamation context, actual malice does not include ill will, spite or evil motive. *Hagler v. Proctor & Gamble Mfg. Co.*, 884 S.W.2d 771 (Tex.1994). "Actual malice" is a term of art which is defined as "the making of a statement with knowledge that it is false, or with reckless disregard[8] of whether it is true." *See Duffy*, 44 F.3d at 313, *quoting Carr v. Brasher*, 776 S.W.2d 567, 571 (Tex. 1989). A finding of such malice requires "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Hagler*, *quoting Casso v. Brand*, 776 S.W.2d 551, 558 (Tex.1989); *Duffy*, *Id.* Where the employee claims that the employer made such references and accusations about him to one with a common interest (such as the employee's new employer), and the employer has pled the affirmative defense of qualified privilege, Texas law places on the plaintiff the burden of proof at trial with respect to malice. *Duffy*, 44 F.3d at 313-14, *citing Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 898 (Tex. 1970). Thus, in the instant case, it matters not whether such statements were true or whether the statements were made to Merrill Lynch and the Chicago

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[8] "Reckless disregard" is defined as a high degree of awareness of probable falsity which the plaintiff shows by presenting "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *See Duffy*, 44 F.3d at 313, *quoting Carr v. Brasher*, 776 S.W.2d 567, 571 (Tex. 1989).

Board of Trade: if there is no clear evidence of "actual malice", then summary judgment was proper on these claims. *See and compare, Duffy v. Leading Edge Products, Inc.*, 44 F.3d at 313-316.

The plaintiff employee must show that the defendant employer acted with malice in order to overcome the affirmative defense of qualified privilege. In its answer to Ragan's counterclaim, Conti pled the defense of qualified privilege. The strongest evidence of malice is that Conti made these statements prior to having any concrete or objective indication of any wrongdoing on Ragan's part. Ragan argues that Conti's admission that it had nothing to support the allegedly defamatory statements until after it made the statements means that Conti had actual malice. Conti argues that the information which was later found by outside auditors confirmed the suspicions which it had communicated in the challenged statements. Neither of these arguments is more probable than the other and, without weighing the evidence, we find that Ragan has not made a showing that is sufficient to constitute the "clear evidence" of malice required to defeat a properly supported motion for summary judgment. Thus, in the absence of such a showing, Conti was entitled to summary judgment against Ragan even if the statements at issue were false.

Ragan also argues that Judge Black erred in dismissing *all* of his claims because he did not appeal Judge Hart's decision to deny Conti's summary judgment motion as to the Merrill Lynch portion of his tortious interference claims or as to his defamation claims. Our review of Judge Black's grant of summary judgment is *de novo*. Judge Black did not articulate any basis for

summary judgment other than Ragan's criminal conviction, and thus did not address Judge Hart's prior decision. The record before us shows that, as a matter of law, there is no genuine issue of material fact regarding Conti's qualified privilege defense. For this reason, we affirm the entry of summary judgment and do not address these arguments.

Ragan also argues that the loss of his trading license in conjunction with Conti's alleged wrongful conduct effectively ended his career in securities and commodities. He challenges Judge Hart's disposition of that claim as well as his claim of tortious interference with his non-Merrill Lynch employment and customer relationships. He asserts that he has shown a reasonable likelihood that, if he had not lost his trading license due to Conti's accusations, he would enter into "business relations" with prospective clients or employers and that, therefore, Judge Hart's dismissal of his claim of interference with business relationships should be reversed. We disagree. As we state in *In re Burzynski*, 989 F.2d 733, 739 (5th Cir. 1993),

> The requisite elements [for an action for tortious interference with prospective business relations] are: 1) a reasonable probability that the plaintiff would have gotten a contract, 2) malicious and intentional action by the defendant which aborted the prospective business relationship, and 3) actual harm to the plaintiff.

Conti has carried its initial burden to show the absence of evidence that it acted with malice. Thus, absent a showing by Ragan that Conti acted in a malicious and

intentional manner, there is no genuine issue of material fact on this element of Ragan's claims of tortious interference. We have already determined that Ragan has failed to show malice as the term of art is used in the context of alleged defamatory statements made by an employer and thus has failed to make a showing sufficient to establish an element which is both essential to his case and on which he would bear the burden of proof at trial. Here, the malicious and intentional actions alleged by Ragan are the alleged damaging statements made by his employer. For this reason, we also conclude that Ragan has not shown a genuine issue of fact as to the "malicious and intentional action" element in his tortious interference claims. Moreover, the record discloses potentially damaging statements made by Conti, but Ragan does not identify evidence that the statements were made to one who does *not* have a common interest.[9] Therefore, Ragan must show malice in order to overcome Conti's qualified privilege defense.

There being no genuine issue of material fact as to a critical element of David Ragan's claim of tortious interference, defamation, slander, & libel, summary judgment against him was proper.

David Ragan also challenges Judge Hart's entry of summary judgment against him on his claims of breach of contract. Conti correctly points out that the arguments

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[9] Both Merrill Lynch and the Chicago Board of Trade had an interest similar to that of Conti's interest as Ragan's employer. *See and compare*, *Duffy* and *Dun & Bradstreet, Inc.*

Ragan asserts on appeal were not presented in the response to Conti's summary judgment motion that was before Judge Hart. For this reason, we will not revisit Judge Hart's decision on this issue.

B. Summary Judgment Against Joe Ragan[10]

Joe Ragan challenges Judge Black's dismissal of his claims for damages allegedly sustained by Conti's orders to close out the positions in his account. By the time that Judge Black granted final summary judgment against Ragan; the only question remaining was whether there was a positive balance in Ragan's account at the time it was closed. Ragan had provided no indication that particular trades were challenged. *See In re ContiCommodity Services, Inc., Securities Litigation*, 733 F.Supp. at 1569-70. Accordingly, Judge Hart had determined that, unlike the conversion claim of other Conti customers which were based upon improper trades, Joe Ragan's conversion claim was that Conti converted the balances in his account and not that Conti improperly closed out their positions. *In re ContiCommodity Services, Inc., Securities Litigation, Id.*

Ragan now contends that his claim is one for damages due to loss of the *value* (at maturity) of the securities in his account and is not a claim for conversion. Ragan asks this court to accept as accurate

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[10] References in this subsection to "Ragan" refer to Joe Ragan. Joe Ragan did not challenge the summary. judgment entered by Judge Hart.

for purposes of damages calculation the value that the securities would have at maturity, rather than the market value of the securities at or near the time they were sold by Conti.[11] He contends that it is Conti's seizure of the securities that gave rise to his damage claim, without regard to what Conti did with them after it took them from his account; on this basis, Ragan argues that his claim is not one of conversion. This argument is not persuasive.

A review of Ragan's counter-claim and the arguments in support thereof which were made before Judge Hart show that Judge Hart's "conversion" characterization was accurate. The record shows no indication that Ragan tried to reinvest in the market or challenged the actions of Conti in closing out his account. Ragan argues that because Conti stopped financing his trades, Conti prevented him from reentering the market -- yet he does not point to any summary judgment evidence that he demanded either reinstatement of his positions or some other action to remedy the situation. A failure to either reinvest or demand reinstatement of one's trading

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[11] Ragan presented some evidence that his position in these securities finally, would have become "positive" some four months after the allegedly improper acts of Conti. However, he cites and we have found no statutory or jurisprudential basis for a finding that, as a matter of law, four months is a "reasonable" time to form the basis for calculating his requested "but for Conti's liquidation" damages in the type of trading that was done in his account.

position amounts to a decision to get out of the market and not risk a further loss. *See and compare, Chipser v. Kohlmeyer & Co.*, 600 F.2d 1061, 1067-68 (5th Cir. 1979). We find no statutory or jurisprudential basis to support Ragan's insistence that the value of Ragan's account is the face value of the securities in the account. Moreover, Ragan has not shown that he is entitled to relief based on this method or other methods of valuation. We affirm the district court judgment as to Joe Ragan.

CONCLUSION

As discussed. above, appellants have not shown that there exists a genuine issue of material fact in this case. Accordingly, we AFFIRM Judge Black's judgment which dismissed the remaining claims of David Ragan and Joe Ragan against ContiCommodity Services, Inc. and Continental Grain Company.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20362

U.S. COURT
OF APPEALS
FILED
OCT. 11, 1995
Charles R.
Fulbrugge III, Clerk

CONTICOMMODITY SERVICES, INC., and CONTINENTAL GRAIN COMPANY,

Plaintiffs-Counter-
Defendants-Appellees,

versus

DAVID J. RAGAN, ET AL.,

Defendants,

DAVID J. RAGAN
and JOE O. RAGAN,

Defendants-Counter-
Plaintiffs-Appellants.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(October 11, 1995)

Before POLITZ, Chief Judge, EMILIO M. GARZA, and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/S/ CARL E. STEWART

United States Circuit Judge

CLERK'S NOTE
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